

HCCW 111 & 116/2015 (heard together)
[2018] HKCFI 358

HCCW 111/2015

**IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE**
COMPANIES WINDING-UP PROCEEDINGS NO 111 OF 2015

IN THE MATTER of the Companies
(Winding Up and Miscellaneous
Provisions) Ordinance, Cap 32, and
sections 722 to 726 of the Companies
Ordinance, Cap 622

and

In the Matter of Money Facts Limited

BETWEEN

HARBOUR FRONT LIMITED

Petitioner

and

LEUNG YUET KEUNG

1st Respondent

MONEY FACTS LIMITED

2nd Respondent

AND

HCCW 116/2015

**IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
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COMPANIES WINDING-UP PROCEEDINGS NO 116 OF 2015

IN THE MATTER of the Companies
(Winding Up and Miscellaneous
Provisions) Ordinance, Cap 32, and
sections 722 to 726 of the Companies
Ordinance, Cap 622

and

In the Matter of Fonfair Company
Limited

BETWEEN

HARBOUR FRONT LIMITED

Petitioner

and

MONEY FACTS LIMITED

1st Respondent

LEUNG YUET WAH, LEUNG YUET KEUNG
and LEUNG YUET HOI

2nd Respondent

LEUNG YUET KEUNG

3rd Respondent

MARCON INVESTMENT LIMITED

4th Respondent

FONFAIR COMPANY LIMITED

5th Respondent

(HEARD TOGETHER)

Before: Hon Harris J in Court

Dates of Hearing: 5-9, 13 June 2017

Date of Judgment: 4 October 2017

Date of Reasons for Judgment: 15 February 2018

REASONS FOR JUDGMENT

The Petitions

1. On 30 March and 2 April 2015 respectively the Petitioner, Harbour Front Limited (“**Harbour Front**”) issued unfair prejudice Petitions seeking the winding up of Money Facts Limited (“**Money Facts**”) and Fonfair Company Limited (“**Fonfair**”) alternatively, in the case of Money Facts, seeking an order that the 1st Respondent, Leung Yuet Keung (“**YK**”), sell his shares to Harbour Front, alternatively Harbour Front and YK make closed bids for each other’s shares. In addition, in the case of Money Facts various orders are sort restraining YK through his control of Money Facts, voting Money Facts’ shares in Fonfair in respect of any proposed sale of land owned by Fonfair and a change of the articles intended to alter the composition of the board. Harbour Front were represented at the trial by Daniel Fung SC and Jenkin Suen and YK by Ms Frances Lok and Vincent Chiu.

The Companies

2. Harbour Front acts as a trustee of a unit trust, whose beneficiaries include YK’s younger brother, Leung Yuet Tung (“**YT**”). YT became bankrupt in March 2001. Prior to that time he was a director of Harbour Front. His daughter Gillian and his son subsequently became directors. Gillian, who was the sole witness called by Harbour Front, was 21 at the time and, I understand, her Brother is younger than her.

3. Money Facts is owned 50% by YK and 50% by Harbour Front. It has 7,900 issued shares. Money Facts and Harbour Front respectively

owns 65.79% and 32.96% of Fonfair’s 12,008 issued shares. The remaining 150 shares are owned as follows: 25 shares by YK, 50 shares by Macron Investment Limited, which is owned by YK and his Wife, and 75 shares by the Administrators of the estate of the late Leung Man Kwong, who is the Father of YK and YT. Money Facts and Fonfair both have one director: YK.

4. Fonfair’s sole asset is a marine lot at Yau Tong. The property has been let and earns rent (“**Land**”).

The Dispute

5. YK refuses to add a representative of Harbour Front to the boards of Money Facts and Fonfair and allow it to have a role in the management of the Companies. This is the principal complaint relied on by Harbour Front. In addition, Harbour Front alleges that YK has misappropriated funds from Fonfair and has mismanaged its affairs. It follows that the focus of the dispute is on the conduct of the affairs of Fonfair.

6. In order to understand the complaints and YK’s defence to them it is necessary to recite in some detail matters the history of the relationship between the Parties to the Petitions, which unfortunately goes back sometime and involves a number of previous proceedings between the Parties and persons associated with them.

History

7. Prior to his bankruptcy in March 2001 YT had been a director of Fonfair. From September 1991 the Land was let to a company

A controlled by YT: Universal Dockyard Limited (“**Universal**”).
B YT misappropriated a portion of the rent paid to Fonfair and subsequently
C allowed Universal to occupy the Land without paying any rent. Once YT
D ceased to be a director of Fonfair YK caused proceeding to be commenced
E (HCA 1886/2001) against Universal seeking the unpaid rent and mesne
F profits. Fonfair obtained judgment against Universal. In his judgment
G dismissing an appeal an order of Master Wong giving conditional leave to
conduct in [13]:

H “Since the safeguards agreed in November 1997 were not
I implemented, for the period up to December 1999 almost all the
J rental income received by the Plaintiff from the Defendant was
K misappropriated by YTL into the account of YTL Limited as
L shown in the account movement record. Thereafter, the
M misappropriation took a different form by YTL simply allowing
N the Defendant to continue in occupation of the Property without
O making any rental payment. On 7 January 2000, YKL raised the
P question of distribution of the rental income with YTL at a
Q meeting, but failed to obtain a satisfactory answer from him. He
R wrote to YTL again on 14 January 2000 demanding the issue be
S addressed. Again YTL did not respond. Then on his instruction,
T his solicitors, Messrs. KF Wong & Co., issued a notice to YTL
U and other directors of the Plaintiff to convene a meeting to
V consider demanding full payment by YTL Limited of
misappropriated funds; commencing legal proceedings against
YTL Limited and against the Defendant to enforce the landlord’s
rights under the tenancy agreement in respect of the Property;
and engaging Messrs Lau & Au Yeung as independent
accountant to receive and administer all future income of the
Plaintiff in accordance with the terms of the Shareholders
Agreement. YTL and Fire Full refused to attend the meeting,
which collapsed due to insufficient quorum.”

8. Universal, effectively YT and those associated with him, did
not comply with the judgment. Fonfair had to apply for a writ of possession,
which Universal tried unsuccessfully to stay.¹ Fonfair had to commence

¹ (unrep., HCA 1886/2001) (19 June 2002, DHCJ A Cheung).

A proceedings against UDL Management Limited ² for delivery up of
B Fonfair's accounts. On order was granted by Master Wong, but not
C complied with, which resulted in further applications to enforce
D compliance.

E 9. On 16 August 2001 and 5 March 2002 respectively Harbour
F Front issued petitions to wind up Money Facts and Fonfair. As in the
G present case the principal complaint was that the Companies had been
H formed on the understanding that both YK and YT were to manage them
I jointly and YK had excluded YT's corporate nominee, Harbour Front, from
J management following YT's bankruptcy, which led to his removal from
K the boards of both Companies.

L 10. The matter came on for trial in November and December 2003
M and Kwan J (as she then was) handed down a comprehensive judgment on
N 2 February 2004 dismissing both petitions. In summary, Kwan J's
O principal findings were as follows:

P 10.1. Money Facts had been formed on an implicit understanding
Q that both YK and YT (the original shareholders) should
R participate in the conduct of its business and that "*neither was
S to be excluded from management and control unless for good
T reason such change should become necessary*": [44].

U 10.2. YK consented to the transfer by YT of his shares in Money
V Facts to Harbour Front. The implied understanding then
extended to Harbour Front: [47]– [49].

10.3. Harbour Front was excluded from management (which does
not appear to have been dispute): [57]–[68].

² (unrep., HCA 2002/2001) (24 November 2006, DHCJ Poon).

10.4. There was good reason for YK to exclude Harbour Front from management and it was thus not unfair:

- (a) Section 156 of the then *Companies Ordinance*, Cap 32, prohibits a bankrupt from acting as a director. Without finding that YT and Harbour Front should be treated as one entity, Kwan J held in [74]:

“there would be ample justification for refusing to appoint a nominee of Harbour Front as director if there is sufficient reason to think that YT Leung would indirectly take part in or be concerned in the management. In view of the matters mentioned earlier, I think it justified to regard it as likely that YT Leung would continue to be involved in the management and control of the companies if given the opportunity.”

- (b) There was a case for investigation by the Official Receiver as to whether the transfer of YT’s shares to Harbour Front was at an undervalue and liable to be set aside pursuant to section 49 of the *Bankruptcy Ordinance*, Cap 6:

“I do not think Harbour Front can justifiably complain in these circumstances that its requests for appointing its nominee to the board of directors of the two companies were not complied with”: [75]– [82].

- (c) There has been misconduct by YT, namely, misappropriating funds of Fonfair in the form of rent received by Fonfair for the occupation of the land by Universal, a company controlled by YT, and subsequently YT’s persistent failure to enforce the tenancy agreement made by Fonfair and Universal. As Kwan J notes in [84]–[88]:

“84. Many of the relevant matters cannot be disputed as they formed the subject of findings in earlier proceedings involving YT Leung and Universal Dockyard. I do not propose to go into allegations of misconduct of YT Leung before Harbour Front became a shareholder of Money Facts and Fonfair in February 1998.

85. For the period from September 1998 to December 1999, almost all the rental income received by Fonfair from Universal Dockyard was misappropriated by YT Leung into the account of YT Leung Trading (see paragraph 13 of the judgment of Deputy Judge To in HCA No. 1886 of 2001, 25 January 2002). As mentioned earlier, YT Leung Trading is wholly owned by YT Leung.

86. Subsequent to December 1999, Universal Dockyard was allowed to remain in possession of the Yau Tong Property without payment of rent....

87. It could be seen from the above that Harbour Front had not only objected to Fonfair's petition to wind up Universal Dockyard but had actively assisted the latter to resist the petition and to thwart Fonfair's attempts to recover the judgment debt for arrears of rent, which had grown to HK\$8.5 million with interest at the time of the hearing in March 2003. In doing so, Harbour Front had changed its stance from asserting that there was no prospect of recovery against Universal Dockyard to justify incurring legal expenses to the opposite position that Universal Dockyard had a positive asset value to justify its investment in that company. In so siding with Universal Dockyard, Harbour Front had acted against the interest of Fonfair and had defeated the first of the three purposes for setting up Money Facts, which was to ensure that as the majority shareholder in Fonfair, 'the rental and other incomes received by Fonfair are properly administered and that after reasonable provisions for expenses such incomes are distributed to the shareholders of Fonfair'. I reject the submission made on behalf of Harbour Front that its opposition to wind up Universal Dockyard was justified for 'sentimental' or commercial reasons. I also reject the submission that the misconduct of YT Leung should have nothing to do with Harbour Front for present purpose. As I have stated at the outset, I have not considered the allegations of misconduct of YT Leung before Harbour Front became a shareholder in the two companies in February 1998. Thereafter, YT Leung's position in the two companies was by virtue of his being a representative of Harbour Front.

88. I find that it was due to the misconduct of Harbour Front that there was a breakdown in the relationship of mutual trust and confidence. In the circumstances, Harbour Front cannot assert its right of equal participation in the management of Money Facts and Fonfair. So for this reason as well, whether singly or cumulatively with one or both of the other grounds that I have considered earlier, Harbour Front has failed to make out a case of wrongful exclusion from management."

10.5. Harbour Front has not come to court with clean hands. In [106] and [107] Kwan J held:

“106. It follows from the findings I have made above that I am against Harbour Front on this issue. The breakdown of mutual trust and confidence was attributable to the misconduct of Harbour Front. By its misconduct, Harbour Front had acted in breach of the Shareholders Agreement, which was the original agreement of mutual trust and confidence, and had thwarted at least one of the three purposes for which Money Facts was set up.

107. As stated by Rogers VP in *Ng Yat Chi v. Max Share Ltd.*, *supra.* at 573D, ‘it cannot be right that a person can rely on principles of justice and equity when he founds his claim on an agreement which not only has he not honoured but has deliberately abused’. Similar statements were made by Ribeiro PJ in *Ng Yat Chi v. Max Share Ltd.* (2001) 4 HKCFAR 299 at 302I in refusing leave to appeal:

‘We also agree with the Court of Appeal that it lies ill in the mouth of a petitioner who has defrauded the company and his fellow investors to complain that he has not been accorded equitable treatment by those other investors, characterised as members of an alleged quasi-partnership. It is a well-known principle that he who seeks equity must do equity.’ ”

11. Kwan J gives a detailed explanation of the relevant genesis of the formation of the relevant companies and matters leading up to the presentation of the petitions in 2001 and 2002 in [4]–[8], [15]–[31] and [56]–[68]. It is not necessary to repeat them here.

12. This was not the end of the litigation between the Parties. On 1 August 2008, Fonfair received an offer from a firm of solicitors, Littlewoods, for the purchase of the Land.

13. By notices for annual general meeting dated 12 August 2008, the shareholders were given an agenda for an annual general meeting to be

A held on 4 September 2008 (“**2008 AGM**”). Item (6) was in the following
B terms:

C “To consider the offer dated 1 August 2008 received from
D Messrs Littlewoods Solicitors for the purchase of the [Land] and
E Yau Tong Marine Lot No. 1 and where appropriate authorise
F specific course of action to be taken by the Directors.”

G 14. The agenda did not call for a resolution for Fonfair to accept
H the Littlewoods Offer, nor did it indicate that the Fonfair board had already
I resolved to accept the Littlewoods Offer.
J

K 15. Gillian Leung (who was the only witness called by Harbour
L Front and is YT’s daughter) confirmed in cross-examination that when
M Harbour Front received this offer, it did not commission a valuation of the
N Land. Harbour Front did not form a view as to whether the Littlewoods
O Offer was high or low, or otherwise commercially advantageous to Fonfair.
P Harbour Front, however, took exception to its continued exclusion from
Q the board.

R 16. On 26 August 2008, Harbour Front took out HCA 1598/2008
S naming the Money Facts directors (YK and Sam Wong at the time) as
T defendants. Harbour Front sought *inter alia* a declaration that YK was in
U breach of the Shareholders Agreement, damages for conspiracy to injure
V against both defendants, and an injunction restraining YK and Sam Wong
from voting in the 2008 AGM.

17. On the next day, 27 August 2008, a summons was taken out
for an urgent interim injunction against YK and Sam Wong to restrain them
from voting on item (6) of the 2008 AGM agenda.

A 18. On 29 August 2008, Recorder Kwok SC dismissed the
B application as an abuse of process.

C 19. On 3 September 2008, Kwan J dismissed Harbour Front's
D application for an interim injunction pending appeal. On 4 September 2008,
E the Court of Appeal dismissed Harbour Front's appeal. The courts at all
F levels took the view that the new proceedings were an abuse of the process.

G 20. Both Recorder Kwok and Kwan J refused to grant injunctions
H because Harbour Front remained in breach of the Shareholders Agreement.
Kwan J says this in [10] of her judgment:

I "I cannot agree with this. On the evidence adduced in this
J application, Harbour Front remains in breach of the
K Shareholders Agreement, and has thwarted the first of the
L 3 purposes for which Money Facts was set up. It has made no
M reparation of the losses suffered by Fonfair as a result of its
N misconduct in the misappropriation of rental income and the
O thwarting of Fonfair's attempts to recover the judgment debt of
P \$8.5 million for arrears of rent owed by Universal Dockyard
Q Limited, which has been wound up in 2003. Harbour Front is
R seeking equitable relief by invoking its rights under the
S Shareholders Agreement notwithstanding it has been and still is
T in breach of the agreement. I am unable to see how its
U misconduct is irrelevant to the equitable relief sought or that its
V breach of the agreement is spent."

O 21. The Court of Appeal dismissed Harbour Front's appeal.
P Rogers VP was similarly clear about the reasons in his judgment:

Q "In my view the commencement of this action was, as
R Mr Recorder Kwok said, an abuse of the process and appears to
S have been an attempt to re-litigate the matters which were raised
T in HCA 1937 of 2007 and in the winding up proceedings to
U which I have referred. Furthermore and most importantly,
V Harbour Front has done nothing to repair the losses suffered by
Fonfair as a result of its misconduct by misappropriating the
rental income and, indeed, thwarting Fonfair's attempts to
recover its judgment debt from Universal Dockyard Ltd. In

A
B those circumstances, quite apart from there being no serious
C question to be tried, Harbour Front is in no position to seek the
D court's assistance by the grant of interlocutory injunctions in this
E case.”
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D 22. It should by September 2008 have been quite clear to Harbour
E Front and YT that if Harbour Front was to have any prospect of returning
F to a role in the management of Fonfair it would have to make good the
G losses it had caused to Fonfair and that if Harbour Front continued with its
H belligerent refusal to respect the decisions of the courts it was likely to find
I itself permanently excluded from a role in Fonfair's affairs. Certainly one
J would have expected Harbour Front's legal advisers, and it has had the
K same solicitor since the presentation of the Petitions in 2001, to have made
L the position clear to Harbour Front and YT.
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K 23. Despite this at no time has YT or Harbour Front made an
L approach in writing to Fonfair or YK with a view to remedying the
M misconduct found by Kwan J. The closest on its own case that
N Harbour Front has come to offering to remedy its wrongful acts is
O exchanges between Harbour Front's solicitor, Tsang Wai Kwan and YK at
P the AGM held on 23 November 2009. Unfortunately, although Harbour
Q Front had the tape made by YK at the AGM since May 2015, when it was
R exhibited to YK's 1st affirmation in the Fonfair Petition, Harbour Front did
S not produce a transcript of it or refer to it in evidence until Mr Fung SC put
T selective parts of it to YK in cross-examination. Ms Lok produced a longer
U transcript and translation, which provides greater context. The exchange
V between Mr Tsang and YK concerns a reconciliation process, which I shall
explain later. It seems to me that what little Mr Tsang says falls far short
of constituting a sensible proposal to make good the loss Harbour Front
was liable for. I will return to this subject in more detail later, but it seems

A to me that Harbour Front has very obviously failed to take appropriate
B action to cure the matters, which Kwan J found justified it from being
C excluded from management of the Companies and led the Judge to
D conclude that Harbour Front had not come to court with clean hands.

E 24. Harbour Front's failure to pay Fonfair unsurprisingly caused
F YK to consider alternative ways of recovering the monies owed to Fonfair.
G By the middle of 2008 YK anticipated that Fonfair would start to
H accumulate a surplus out of rental income. On 1 August 2008, Fonfair's
I board resolved that the proportion of the surplus which represented
J Harbour Front's interest in Fonfair be set-off against the sums owed by
K Harbour Front.

L 25. It is YK's case that at the 2008 AGM of Fonfair the rationale
M for the board resolution was explained by him to Harbour Front's
N representatives, who attended, namely, its solicitor Mr Tsang and
O Jerry Leung and no objection was expressed. This is recorded in some
P detail in the minutes. Harbour Front disputes this, but called neither
Q Mr Tsang nor Mr Leung to give evidence. YK was asked about this in
R cross-examination and gave clear evidence that the subject was discussed
S and the board minute produced to attendees, which seems borne out by the
T recording of the meeting. I, therefore, find that what we find recorded in
U the minutes was explained and no objection was raised, although Harbour
V Front's representatives did request further information. The minutes
record the following:

"REPAYMENT OF DEBTS OWED TO RELATED PARTIES
(02:22:00 to 02:45:00)

In relation to Item 4 of the Notice of the 2008 Annual General
Meeting and responding to Question 3 of the list of Questions

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and Statement tabled by Harbour Front at the meeting: 'To receive update briefing by the Manager in relation to repayment of debts owed by the Company to related parties', a resolution of the Directors of the Company dated 1 August 2008 was presented to the meeting. Specifically, attention was drawn to the fact that a buildup of cash surplus was expect [expected] over the coming months and in view of the accepted mandate and past practice for such surplus to be distributed to the shareholders, the Directors considered it necessary for a review of the accounts of related parties with the Company to be performed for the purpose of facilitating the distribution of the surplus. To address that need, it was proposed and resolved by the Directors that: (1) Messrs Lau & Au Yeung be commission [commissioned] to perform a reconciliation exercise similar to that performed in 1997 for the purpose; (2) YK Leung be authorized to administer the disbursement of funds from the Company's bank account to facilitate payments due and payable, if any, to the Relevant Parties accordingly; and (3) with a view of maintaining a reasonable degree of transparency in the administration of settlement of accounts with the Relevant Parties, YK Leung should report the progress of the settlement of account at each General Meeting of the shareholders of the Company.

Details of the Directors resolution was then introduced to the meeting with the Chairman emphasizing the fact that the exercise would be done on exactly the same basis as the reconciliation carried out in 1997 including the charging of interest on sums overdrawn.

So far as the subject repayment of debts was concerned, it was reported to the meeting that: (1) no payment had yet been disbursed to any party up to the time of the AGM; (2) the Directors considered the matter to be an operational matter of the Company that did not require the approval of the shareholders but nevertheless accepted that it should be reported as a matter of fair practice and to ensure reasonable transparency in the management in the affairs of the Company.

Harbour Front requested access to further information in response to which, the Chairman confirmed that whilst the Company was bound and hence stand ready to release any information that it was obligated to do by law, for anything beyond that, it would be up to Harbour Front to make a case for its request and the company would consider such request on the merit of each request on a case to case basis."

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26. Neither Harbour Front nor its solicitors wrote following the
2008 AGM objecting to the board's proposed course of action and this
remained the case until the AGM for 2009, which took place on
23 November 2009.

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27. As I have mentioned the only witness, who gave evidence on
behalf of Harbour Front was Gillian Leung. During her cross-examination
she suggested that Harbour Front had asked how much Fonfair suggested
it owed in earlier AGMs. As was put to her by Ms Lok, there is no
reference to this in her witness statements or the Petitions. In
re-examination a transcript of the 2009 AGM was produced with a view to
supporting her evidence. This was unsatisfactory. As I mentioned in [23]
Harbour Front had had the tape since May 2015. If it was considered of
assistance, it should have introduced it into evidence properly by way of
Gillian Leung's witness statement. A fuller transcript of the AGM
recording the exchanges between YK and Mr Tsang, who again
represented Harbour Front, paints a rather different picture than the one
that Mr Fung tried to illicit from Ms Leung during re-examination. There
is no reference by Mr Tsang to previous requests on behalf of Harbour
Front to be told how much Fonfair believes it is owed. Neither is there any
suggested figure or any offer to pay anything. Whilst it is correct that
Mr Tsang inquires about how much YK says is owed he does not suggest
that this is because Harbour Front wishes to repay what it owes. The
dialogue between them is vague and contains nothing to suggest that
Harbour Front wishes to engage seriously in agreeing how much it should
repay. If that is what Harbour Front intended one would have expected
that either it, or more likely its solicitors, would have written after the
meeting following up on the exchange between YK and Mr Tsang, but
there is nothing.

28. On 23 November 2009 an interim report on the amounts received by the shareholders of Fonfair or their associated companies for the period from 24 September 1998 to 30 September 2008 was provided to Harbour Front along with the notice of the 2010 AGM, which took place on 23 November 2010. This should have come as no surprise to Harbour Front as YK had explained at the 2009 AGM held on 23 November 2009 that such a report was being prepared. The interim report was prepared by Lau & Au Yeung CPA Ltd. It explains in the introduction that the purpose of the report is to quantify the amount of drawing attributable to YK and YT and their respective companies. It describes the documents that they have been provided with to prepare the report. Appendix II contains an assessment of the rent owed by UDL and interest charged on the rent that the accountants have assumed to be outstanding. Appendix III contains other items of loss attributable to UDL's occupation. It also includes in Appendix I drawings by YK and interest charged on those drawings. YK explains in his evidence that interest was charged to all items in Appendices I, II and III for consistency. It is YK's case that once parity had been achieved and agreed Fonfair's financial statements would be adjusted to reflect this and from then on the surpluses would be distributable to shareholders. The interim report is detailed and in my view it should have been quite clear to Harbour Front the amounts Fonfair believed were owed to it by Harbour Front.

29. The AGM was attended by Gillian Leung, Jerry Leung and Mr Tsang. The interim report was explained. Harbour Front's representatives did not take the opportunity to discuss the report in detail.

30. Harbour Front's reaction to the interim report was not to engage in a discussion about the methodology or figures. Instead they

A wrote to Lau & Au Yeung on 20 November 2010 a letter, which in my view
B was clearly calculated to intimidate them into withdrawing the interim
C report, making intemperate complaints of breaches of professional conduct,
D and seeking information about various items in the audited financial
E statements to which as a shareholder it was not entitled. There then
F followed similar letters. There is no suggestion in any correspondence
G from Harbour Front that it has a genuine wish to agree the sums that it owes.
H The tenor of the correspondence points to the opposite conclusion.
I Harbour Front had no intention to be anything other than hostile and
J uncooperative despite by this time it having been made clear in the
K decisions of various judges to whom I have referred that Harbour Front's
L conduct until remedied effectively barred it from involvement in the
M management of the business. It is striking that the only correspondence
N from Harbour Front or its solicitors of any substance concerning the
O payment of the sums owed to Fonfair are the letters in November and
P December 2010, which manifestly exhibit hostility to agreeing what is
Q owed.

31. Similar reports were provided in the following three years
culminating in a report in November 2013 for the period 24 September
2008 to 30 September 2013. Harbour Front made no effort during this
period to engage in a constructive discussion about the contents of the
subsequent reports or agree the amounts it owed.

32. On 10 November 2014 a further interim report came available
and was provided to Harbour Front in advance of the AGM on 12
December 2014. The transcript of the AGM on 12 December 2014, by
which time Harbour Front had had sufficient time in my view to consider
it, records a discussion between YK and Mr Tsang about the report, but

A Mr Tsang does not raise any particular objection to the calculation of the
B sums owed by Harbour Front. I would also note that contrary to the
C suggestion put to YK in cross-examination it would appear from the
D transcript that YK did say that the parties' respective withdrawals were
E close to balancing and I so find. It should, therefore, have been apparent
F to Mr Tsang and Jerry Lau if they were paying attention that according to
G YK and Lau & Au Yeung's calculation the parties were close to parity.
H Harbour Front did not, however, take any steps to clarify the position or
I what YK intended to do once in his view parity had been reached.

H 33. The next major event in this sorry tale arose shortly after an
I agreement was entered into by Harbour Front and YT's trustee in
J bankruptcy 12 February 2015 in respect of avoidance proceedings
K involving a transfer by YT of his shares in Money Facts and Fonfair to
L Harbour Front. The agreement provided that Harbour Front would make
M good all claims in the bankruptcy (clause 1) failing which (clause 6) the
N trustee could take steps to realise the value of the Harbour Front's shares
O in Fonfair. On 9 March 2015 Harbour Front wrote to YK offering to sell
P its shares in Fonfair and Money Facts to him. The letter also stated that
Q liabilities owed to the trustee could be as much as HK\$825,000,000.

P 34. On 16 March 2015 an offer was received to purchase the Land
Q from Ching Sing Real Estate Company Limited ("**Chung Sing**"). Both
R Fonfair and Money Facts's boards resolved to hold extraordinary general
S meetings to consider the offer, which Gillian Leung acknowledged in
T cross-examination brought the offer to Harbour Front's attention. Shortly
U thereafter Harbour Front published an advertisement offering to sell its
V indirect interest in the Land. On 24 March 2015 Harbour Front also offered
to purchase YK's shares in Fonfair and Money Facts for HK\$30,400 per

A share and offered to buy Fonfair's interest in the Land for HK\$379,000,000. Harbour Front then on 26 March 2015 requisitioned extraordinary general meetings of both Fonfair and Money Facts to resolve that Fonfair accept Harbour Front's offer to purchase the Land and reject the offer that had been received from Chung Sing. On 27 March 2015 Harbour Front requisitioned extraordinary general meetings of Fonfair and Money Facts to resolve to sell the Land by public auction or tender.

35. Gillian Leung was cross-examined on Harbour Front's motive and approach to its own offer and alternatives to accepting the Chung Sing offer. She agreed that generally the best price would be achieved by selling the Land rather than a partial and indirect interest in it. She also accepted that Harbour Front had not commissioned a valuation of the Land before deciding to make its proposals.

36. On 30 March 2015 Harbour Front petitioned to wind up Money Facts and on 2 April 2015 petitioned to wind up Fonfair. The Petitioners advance the same complaints in both Petitions. I accept Ms Lok's submission that it is a compelling inference given the history of this matter that the Harbour Front's offers and proposals in March 2015 were not genuine, but were made with a view to interfering in the sale of the Land to Chung Sing as were the presentation of the Petitions.

Harbour Front's Pleaded Case on Unfair Prejudice

37. As Mr Fung explains it in his written opening I am required to determine whether or not the following matters constitute unfair prejudice:

- (1) Harbour Front's exclusion from management.

- (2) Mismanagement.
- (3) The reconciliation exercise.

Exclusion from Management

38. As will be apparent from my summary of the history of this matter it is not in dispute that Harbour Front has been excluded from management. Neither is it disputed that generally this will constitute unfair prejudice.

39. It will also be apparent from my summary of the history of this matter that it is YK's defence that Kwan J found that Harbour Front had rightly been excluded from management in her Ladyship's 2004 judgment and that as it has done nothing to purge its breach of the Shareholders Agreement Harbour Front remains fairly excluded from management.

40. Mr Fung's argument in response is that Harbour Front cannot be excluded for ever and Harbour Front's ability to cure its breaches has been hampered by YK's failure to provide details of what is required of Harbour Front. It seems to me that both of these arguments fail and the latter is disingenuous.

41. As, in my view, is clear from the history of the disputes between YK and Harbour Front, which I do not think it can sensibly be suggested in practice is anything other than YT's corporate alter ego, YT has made no sensible effort to try and establish what needs to be done to remedy the breaches of the Shareholders Agreement. The opposite is the position. YT and Harbour Front have made no effort to engage

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meaningfully to agree what is owed despite being given the interim reports. Instead Harbour Front tried to intimidate Lau & Au Yeung in to stopping compiling them. Harbour Front has made no effort to propose an alternative method for agreeing what is owed and moving on. The guiding mind behind Harbour Front, who as I have said I think it is reasonable to assume is YT, is motivated by an animosity towards YK and a lack of objectivity, which seems to render any prospect of Harbour Front doing what is required to remedy its breaches illusory.

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42. I find that Harbour Front has fairly been excluded from management. In my view this will remain the case until such time as Harbour front takes genuine and substantial steps to remedy its misconduct. Mr Fung has cited no authority for the proposition that a finding that a shareholder has been fairly excluded from management becomes spent simply by effluxion of time even if the shareholder has made no substantive effort to remedy his wrong as I have found to be the position in the present case. This is entirely unsurprising as the proposition seems to me to be as meritless as it is unattractive. If a shareholder acts in such a way as to destroy the mutual trust which was central to any agreement that he could take part in management, it seems to me clear that until such time as he remedies the misconduct, if it is possible to do so and it might not, he loses the right to argue that his exclusion alone justifies the court making a winding-up order on the just and equitable ground or granting relief for unfair prejudice. The reason is simple: it would not be just and equitable to wind up in these circumstances and the exclusion from management is not unfair.

The impact of Harbour Front's failure to remedy its misconduct on its right to relief

43. The only text Mr Fung was able to cite, which he suggested supported the proposition is a passage in *Hollington on Shareholder Rights* (8th ed) [7-200-202] in which it is suggested that misconduct is only relevant if it has an “*immediate and necessary relation to the unfairly prejudicial conduct of which complaint is made*”. In so far as this passage is to be read as suggesting that matters occurring in the past are necessarily irrelevant, I disagree, but it seems unlikely that this is what the author intended. What seems to be suggested is that misconduct must in some way be connected to the unfairly prejudicial conduct. In my view as a general proposition this is wrong. As the Court of Appeal state in *Ng Yat Chi v Max Share Ltd*:³

“[I]f the misconduct were causative of the breakdown, that in itself would be conclusive. But I do not consider that a petitioner can consistently and persistently abuse his position to defraud the Company and then rely upon some prior arrangement based upon mutual confidence, to which he had not adhered, to found his claim.”

44. The Court of Appeal in *Harbour Front Ltd v Leung Yuet Keung & Wong Sum Yuen*⁴ found that Harbour Front's failure to remedy its misconduct was a bar to its application for injunctive relief. In my view these decisions illustrate that it is not necessary that there is a direct causative link between the alleged misconduct and the unfair prejudice in order to deprive a petitioner of relief to which he might otherwise be entitled. A petition to wind up on the just and equitable ground requires the court to assess what is equitable between the parties and generally if

³ [2001] 1 HKLRD 561, 572H-I.

⁴ (unrep., CACV 260/2008) (18 September 2008), [10].

A the court has found, as Kwan J did, serious misconduct, which is by its
B nature capable of being remedied, it will be proper to refuse relief to the
C complainant until the misconduct has been remedied, or it has been
D demonstrated that the complainant has made a serious attempt to do so,
E even if some of the matters complained of are unconnected with the
F misconduct. There may be cases in which new complaints of unfair
G prejudice arise, which are so serious that they justify a departure from this
H general approach and the equitable maxim that equity requires those who
I seek equity to do equity yields to the more general interests of justice. This
J is not such a case. In my view Harbour Front has not only failed to remedy
K its misconduct, but prior to presentation of the Petitions made no
L substantial effort to do so. It has since presentation of the Petitions made
M proposals to mediate, but in my view this is too little too late to relieve it
N of the consequence of failure to address misconduct, which in my view is
O that the Petitions should be dismissed even if I am satisfied that some of
P Harbour Front's new complaints have been made out. I turn to consider
those other complaints, but before doing so I would add this. So far as the
complaints concerning the reconciliation process which resulted in the
interim reports are concerned, it seems to me that there is a direct
connection between the misconduct and the complaint, so that even if
Mr Fung's submission were correct, it would still be proper to refuse relief
even if the complaints about the reconciliation were made out.

Q *Mismanagement*

R 45. In his written opening Mr Fung submitted that it "*is trite law*
S *that serious mismanagement of a company constitutes unfairly prejudicial*
T *conduct and can be a ground for a winding up, where such serious*
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mismanagement results in a justifiable loss of confidence in the management of the company.” This is a misleading over simplification.

46. As Warner J observes in *Re Elgindata Ltd*⁵ there is little authority on the extent to which negligent or incompetent management is capable of constituting unfair prejudice. This is partly because practitioners in this field recognise that the quality of management varies and a shareholder has no right to expect management of the company in which he is invested to be free of error and instances of poor judgment. It is likely that errors of judgment will be made from time to time and a shareholder must be taken to understand this. As Peter Gibson J observes in *Re Sam Weller & Sons Ltd*,⁶ when addressing a claim that proposed capital expenditure unsupported by any evidence that the expenditure would prove profitable was unfairly prejudicial, the court will normally be reluctant to accept that managerial decisions amount to unfairly prejudicial conduct; a view repeated by Warner J in *Elgindata*,⁷ and with which I agree. I also agree with Warner J that short of a breach by a director of his duties of skill and care there is no *prima facie* unfair prejudice to a shareholder if management makes a poor business decision.⁸ As I state in [36] of my judgment in *Re Hang Seng Engineering Factory Limited*:⁹

“However, specific acts of mismanagement, particularly, if they occur over an extended period of time, as opposed to occasional mistakes, are capable of constituting unfair prejudice¹⁰. Normally, these would have to be sufficiently serious that they constitute breaches of director’s duties. Isolated breaches of duty are unlikely to constitute unfair prejudice unless they are particularly serious.”

⁵ [1991] BCLC 959, 993a.

⁶ [1990] BCLC 80.

⁷ *Supra*, 993i

⁸ *Supra*, 994c

⁹ (unrep., HCCW 100/2011) (15 March 2013).

¹⁰ *Re Macro Ipswich Ltd* [1994] 2 BCLC 354 at 406E–G.

A 47. As was the case in *Elgindata* the Fonfair Petition does not
B contain an allegation of breach of YK's duty as a director of skill and care.

C Paragraph 109 of the Petition states:

D "Further, whilst Leung Yuet Keung has criticised the Petitioner's
E conduct and the previous management of the Company by the
F Petitioner's representative, after he had assumed control of the
G Company and became responsible for managing the Land
H including leasing of the Land, Leung Yuet Keung has using his
control of the 1st Respondent, Money Facts, in his dealings with
finding suitable tenants, enforcing the rights of the Company and
in negotiating with potential tenants persistently mismanaged
the Company and has through numerous acts of misfeasance
caused significant loss and damage to the Company details of
which appear below."

I 48. There is then set out three complaints. The first is in respect
J of a tenant Kwong Wing:

K "110. Kwong Wing was a tenant of the Land which Leung Yuet
L Keung originally considered a suitable tenant. However,
Kwong Wing later defaulted in paying rent and according to
Leung Yuet Keung, the Company had to take legal action and
obtain possession of the Land.

M 111. After some proceedings, Leung Yuet Keung reported that
N the Company had successfully appealed a district Court
O judgment ruling that Kwong Wing was not liable in damages.
However, the proprietor of Kwong Wind had alleged he was
impecunious. Leung Yuet Keung stated that the Company had
incurred legal costs of around HK\$264,000, much of it due to
the need to appeal."

P 49. The Petition then continues with a complaint that YK refused
Q to provide documents concerning the proceedings against Kwong Wing.
R In [113] it is alleged that:

S "Due to the wrongful refusal by Leung Yuet Keung to provide
T documents to the Petitioner, it appears that the Company
U suffered losses of rent and expended considerable legal costs
V which were all irrecoverable."

A The Petitioner as a shareholder was not entitled to the documents it
B requested and I can see no sensible reason for drawing the conclusion that
C [113] invites or for treating the complaint set out in [110] and [111] as
D constituting a breach of a duty. This claim was not pursued at trial. I have
E addressed it because it illustrates the extent to which the Petition is an
attempt to construct a claim against YK.

F 50. There is then pleaded in [114] to [117] a claim in respect of
G another tenant, Full Creation, which was also not pursued.

H 51. The only claim of mismanagement contained in the Petition,
I which was pursued at trial was in respect of the termination of a tenancy to
J a company called Mega Yield. It is set out in [118] to [122] of the Petition.

K “118. Later, Leung Yuet Keung said that Mega Yield had
L accepted the Company’s repudiation of the tenancy agreement
and issued proceedings against the Company in HCA 948/2009
for reimbursement of waiver application fees and deposits paid,
associated costs and loss of profits.

M 119. Leung Yuet Keung informed the meeting that he
N considered that the Company’s defence of failure by Mega Yield
to mitigate was a strong one and the loss claimed by Mega Yield
would be difficult for it to prove.

O 120. Leung Yuet Keung indicated that the new tenant was
P willing to bear such costs for the Company and had put down a
deposit of an amount of more than HK\$5 million in a
stakeholder account for such purpose.

Q 121. In the event, as referred to above, Mega Yield succeeded
R in its action against the Company in HCA 948/2009 and the
S Company’s appeal against judgment was dismissed. The total
liability of the Company to Mega Yield was stated by Leung
T Yuet Keung in December 2014 to be around HK\$17 million,
U subject to what Leung Yuet Keung described was a partial
V indemnity provided by the principal behind the tenant of the
Land, the identity of which principal Leung Yuet Keung refused
to disclose to the Petitioner.

122. Both the trial judge in the Court of First Instance, and the Court of Appeal were critical of the way in which Leung Yuet Keung dealt with Mega Yield and his dealings in the Land, and the Petitioner shall refer to such judgments at trial.”

52. Fonfair had signed a pre-lease with Mega Yield on 24 January 2007 giving Mega Yield the option to lease the Land for a period of two years from 20 October or 2008 or 20 December 2008 at the option of Mega Yield. As I understand the facts later in 2007 the tenancy of the then tenant Vision Resources was terminated for non-payment of rent and YK decided to let the Land to New Creation, despite the existence of the pre-lease, intending to terminate New Creation’s tenancy and occupation by October 2008 pursuant to early termination provision in its lease. YK’s thinking was, he says, to try and avoid there being a period when the Land was unoccupied and not generating rent. A dispute arose between Fonfair and New Creation concerning the application of the termination provisions. New Creation refused to give vacant possession and the Company commenced proceedings to recover the Land. DHCJ Woo describes this dispute in [25] to [27] of his judgment in a High Court Action¹¹ that was subsequently commenced by Mega Yield, which I describe in the next paragraph:

25. The defendant’s inability to obtain possession of the Lot for making it available to the plaintiff to start its Lease by 20 December 2008 was undoubtedly caused by Full Creation. However, the defendant had only itself to thank by putting itself into the predicament purely because it was willing to take the risk of Full Creation remaining in possession despite the termination of Full Creation’s Lease. This kind of behaviour of a sitting tenant is not uncommon, but the defendant was apparently unwilling to give up a single day of rent to leave the Lot un-let and unoccupied for any period between two succeeding tenancies. Another thing that the defendant had itself to thank was this ‘controversy-free’ provision. In my view, the provision, especially in the way that was couched in the said

¹¹ (unrep., HCA 948/2009) (5 March 2013).

A clause 1(e), was inviting difficulty, providing ready ideas to
B people who wish to be argumentative. B

C 26. The failure on the part of the defendant to recover
D possession from Full Creation by 20 December 2008 was not
E actually caused by the assurances (alleged by the defendant)
F given to the defendant by the plaintiff or Mr Siu of RHL as the
G plaintiff's agent that the Waiver would be issued by Government
H by 30 September 2008 or would be backdated to 30 September
I 2008, but it was rather caused by the interpretation of the
J provisions in the said clause 1(e) and the said clause 11 as
K Full Creation would wish. Those provisions were not made by
L the plaintiff and their terminology could not have been decided
M or contributed to by the plaintiff. The reliance on the provisions
N by Full Creation could not have been the doing of the plaintiff,
O but the effect was that the defendant was unable to recover
P possession of the Lot by 20 December 2008. While if the
Q plaintiff was able to obtain the Waiver by 30 September 2008 or
R have it backdated to that date, it would have been helpful to the
S defendant in its attempt to recover possession from Full Creation,
T the failure to obtain the Waiver by 30 September 2008 could not
U reasonably be blamed on the plaintiff as the cause for
V Full Creation's refusal to give up possession or as the cause for
the defendant's failure to recover possession on 20 October or
20 December 2008.

L 27. Indeed, eventually when Reyes J gave judgment in HCA
M 1915 of 2008 and HCA 835 of 2009 (a further action by the
N defendant against Full Creation and also against On Kee (HK)
O Environmental Recycling Limited ('On Kee')) on 22 July 2009,
P he declared that the defendant was entitled to vacant possession
Q of the Lot as from 20 September 2008 on the basis that the
R defendant was entitled to and did determine Full Creation's
S Lease pursuant to the said clauses 1(e) and 11 thereof. This
T vindicated the defendant vis-à-vis Full Creation. On Kee who,
U as the defendant alleged in HCA 835 of 2009, had taken up a
V sub-tenancy of the Lot from Full Creation without the
defendant's consent, denied that it was ever a subtenant on the
Lot, which of course did not obstruct the defendant in getting an
order for possession of the Lot. The judgment also vindicated
the plaintiff vis-à-vis the defendant on this topic, because the
judge dismissed as invalid the reliance by Full Creation on the
argument of the prerequisite of the plaintiff obtaining the Waiver
by 30 September 2008 or at all."

S 53. As a result of the dispute with New Creation vacant
T possession was not given and on 31 March 2009 Mega Yield issued a writ
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accepting what it alleged was the Company's repudiation of the tenancy agreement bringing it to an end. The Company defended the claim on the grounds that Mega Yield had not met certain assurances it had given at the time the pre-lease was negotiated and this had hampered the Company's ability to obtain vacant possession from New Creation. DHCJ Woo rejected the Company's defence and in his judgment found YK to be an unreliable witness.

54. Self-evidently YK's attempts to secure a source of rent between the termination of Vision Resources occupation and October 2008, led to the claim by Mega Yield. I accept that this was mismanagement on YK's part. In so far as it resulted in loss to the Company it prejudiced Harbour Front's economic interest in the Company. The material question in my view is whether it did so to an extent that of itself was sufficiently unfair to justify the relief that is sought, namely, a winding-up order? In my view it does not.

55. Although YK's judgment in this matter was unsatisfactory, it is one incident. It was not so serious as to jeopardise the Company's future viability. It does not suggest that YK cannot be trusted to run the Company satisfactorily in the future or that the value of Harbour Front's investment is seriously imperiled if management of the Company is left in YK's hands. It is a one-off matter of mismanagement, which would be more appropriately the subject of a derivative action.

56. I would also note that the events complained of occurred some 10 years ago and the Court of Appeal handed down judgment on 18 September 2014 dismissing Fonfair's appeal of the Deputy Judge's judgment. The Petition was issued in April of 2015 and the complaint in

A respect of Mega Yield is the final matter mentioned in it. It would appear
B from the chronology of the disputes between YK and Harbour Front, and
C the way in which Harbour Front has formulated its claims in the Petition,
D that the litigation involving New Creation and Mega Yield was not the
E prime motivator in Harbour Front issuing the Petition or causing loss of
confidence in YK.

F *The Reconciliation Exercise*

G 57. This complaint relates to the way in which YK addressed the
H failure of Harbour Front to make good the loss caused by YT's breaches.
I As I have explained YK dealt with this by having the interim reports
J prepared by Lau & Au Yeung recording the losses that YK treated as
K attributable to Harbour Front and the amounts that he himself had drawn
L from the Company. I have already explained that in my view Harbour
M Front had failed to propose any sensible way of assessing the loss that had
N been suffered by the Company or to engage with YK constructively over
the agreement of figures once he started to provide the interim reports. In
my view it is quite clear that Harbour Front had no interest in having a
constructive dialogue with YK over compensating the Company.

O 58. Mr Fung criticises YK's chosen method of dealing with
P Harbour Front as illegal self-help. He argued that YK was not entitled to
Q withdraw money from the Company for his own benefit without making
R similar distributions to Harbour Front even if it was done in an attempt to
S correct the losses caused to the Company for which Harbour Front is liable.
The implication is that the Company should have sued to recover its losses.
T The issue is not, however, whether there was a better way or proceeding or
U a legally more orthodox way of recovering the losses for which Harbour
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Front is liable. The issue is whether it has caused unfair prejudice which justifies the making of a winding-up order or an alternative remedy under section 180(1A) of *the Companies (Winding Up and Miscellaneous Provisions) Ordinance*, Cap 32.

59. The case against YK is formulated as follows in the Fonfair's Amended Petition:

"72. The Petitioner disputes the validity of the calculations made in the so-called interim reports and the amounts siphoned off by Leung Yuet Keung but in any event, from such latest so-called interim report, it is apparent that Leung Yuet Keung has received more than any possible entitlement to damages and interest claimable against the Petitioner in relation to the breaches referred to in paragraph 51(l).

...

Misappropriations of the Company's assets in the course of 'self-help' measures

74. Further or alternatively to the above, even in the event that Leung Yuet Keung was entitled to adopt the 'self-help' measures since about 2008 to make payments to himself to cover his actual losses, details provided in the 'Interim Report on the Drawings by the Shareholders and their Related Companies during the period from 24 September 1998 to 30 September 2014', show that through the use of the voting rights of, and with the aid of Money Facts, Leung Yuet Keung has clearly misappropriated funds of the Company in relation to certain amounts which is not entitled to take account of and to make payment to himself in respect of such amounts.

75. By way of example, from the 'Interim Report on the Drawings by the Shareholders and their Related Companies during the period from 24 September 1998 to 30 September 2014', and without prejudice to the Petitioner's objections to other amounts, some of the clearest examples of amounts which Leung Yuet Keung was not entitled to, (and which the 1st Respondent, Money Facts clearly was also not entitled to, and cannot condone and assist the perpetration of such misappropriations by Leung Yuet Keung) include the following:

- (1) There are disputes as to whether Universal vacated the Land in about October 2002, and in the absence of any

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adjudication on this, Leung Yuet Keung has wrongfully taken Universal to have vacated at the end of November 2002, thereby purporting in the calculation to include additional months of mesne profits at HK\$226,000 per month and also purporting to charge interest on such additional amounts;

(2) No judgment or costs order has been made in a number of legal proceedings listed in the interim report on which claims and deductions are made against the Petitioner's entitlements in the Company, most of which do not even involve the Petitioner, and these proceedings include HCMP 2089/2002, HCA 4523/2002, HCA 5435/2001, HCA 3102/2002, HCA 485/2003. and HCA 624/2005. In the circumstances. other than highlighting the wrong and arbitrary basis on which the so-called interim reports have been prepared, there is no legal basis on which costs, and interest on such costs can be claimed against the Petitioner. Any purported drawings relating to the same made by Leung Yuet Keung with the endorsement of Money Facts from the Company's funds constitute misappropriation of the Company's assets and unfair prejudice to the Petitioner which has been wrongfully denied such corresponding entitlements;

(3) In HCA 2002/2001, the Company under the management of Leung Yuet Keung unsuccessfully pursued committal proceedings as a result of which costs orders were made against the Company. The Petitioner was not a party. As at 30 September 2014, a claim for HK\$3,052,118.12 said to be costs and interest was calculated to be due from the Petitioner, when the Petitioner was not even a party, and a costs order for the whole committal proceedings was made against the Company. This highlights the arbitrary and wrong bases on which the so-called interim report has been prepared, the degree of misappropriation by Leung Yuet Keung based on the so-called interim report, and the proceedings themselves demonstrate the level of misfeasance and mismanagement by Leung Yuet Keung in causing such a large loss to the Company:

(4) In HCMP 436/1999, which are proceedings which did not involve the Petitioner, a claim has been set out in the interim report for HK\$384,617.47 as at 30 September 2014 in relation to legal costs and interest incurred in those proceedings. Those proceedings concerned the failed attempt by the Company to scuttle revisions to a scheme of arrangement under section 166 of the previous Companies Ordinance Cap. 32, in which the Court awarded costs to the scheme administrator against the Company. Apart from the

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Petitioner not being liable for the same, such proceedings and the liability incurred by the Company under the management of Leung Yuet Keung are another example of his mismanagement and misfeasance, and demonstrate the extent of misappropriations based on the so-called interim report.

76. Any purported amounts over calculated in the so-called interim reports together with any purported interest thereon would, upon being paid to Leung Yuet Keung or his nominee, constitute misappropriations by Leung Yuet Keung from the Company, made with the support of Money Facts. In addition, the same acts would constitute acts of unfair prejudice against Harbour Front which has been excluded from the whole process and has not been provided with sufficient information to assess the alleged calculations in the so-called interim reports.

77. In order to facilitate his misappropriations from the Company, including in relation to the above examples, deductions under the interim reports have persistently been presented to AGMs of the Company as a fait accompli. It has been the practice of Leung Yuet Keung using the position wrongfully obtained and maintained through the use of the Money Facts majority vote at meetings of the Company, to first commission such so-called interim reports through the use of his exclusive control of the Company's board of directors, thus negating the need to inform the Petitioner and such of the minority shareholders who are not associates of Leung Yuet Keung, and then to withdraw funds from the Company's bank account relying on such so-called interim reports, and only bringing such withdrawals to the attention of shareholders of the Company at AGMs without providing sufficient notice or supporting information to verify Leung Yuet Keung's entitlement to take such money from the Company."

60. The complaints are substantially the same in the Re-re-Amended Money Facts Petition.

61. The monies that YK received from the Company and which are recorded in the interim reports were authorised by the Company and recorded in the interim reports. They were certainly not clandestine misappropriations. The complaint in [77] about the lack of opportunity to verify YK's "entitlement" is disingenuous. As I have explained, Harbour

A Front's representatives showed no interest in agreeing the interim reports.
B We find not one letter from Harbour Front or its solicitors during the
C four year period in which they were provided asking for more information
D other than for the initial unconstructive correspondence with Lau &
E Au Yeung.

F 62. Stripped of its more disingenuous elements the complaint
G amounts to this: YK did not calculate the amounts attributable to Harbour
H Front correctly. In addition, Mr Fung put to YK a case in
I cross-examination, which is not pleaded and as a consequence I hold it is
J not open to Harbour Front to rely on in either Petition, namely, that the
K reports in March 2015 and March 2016 show a widening gap between the
L amounts owed or owing to the shareholders and that YK was altering the
M accounting method to favour his interests. However, I accept YK's
N explanation that it was decided to change the way interest was charged.
O Rather than it being charged to YK and Harbour Front it was to be borne
P by Fonfair as it has been under an earlier reconciliation exercise carried out
Q in 1997. YK said the intention was to reduce the room for argument
R between the parties.

S 63. The complaints in the Petition, which I have quoted above fall
T into two categories. The first relates to the calculation of the rent owed by
U Harbour Front: [75(1)]. The second concerns the inclusion of legal costs
V in the sums for which Harbour Front is treated a liable: [75(2)]–[75(4)].

A 64. The first complaint is without any merit. Kwan J found as an
B undisputed fact in the winding up¹² of Universal that vacant possession was
C not given to Fonfair until mid-December 2002.

D 65. The reason why Fonfair has charged legal costs to Harbour
E Front is that they were caused, so YK contends, as a consequence of
F Harbour Front's breach of the Shareholders Agreement. Ms Lok referred
G me to [10] of Kwan J's judgment in HCA 1598/2008¹³ in which her
Ladyship holds that reparation includes:

H "... losses suffered by Fonfair as a result of its misconduct in the
I misappropriation of rental income and the thwarting of Fonfair's
attempts to recover the judgment debt of \$8.5 million for arrears
of rent owed by Universal Dockyard Limited, which has been
wound up in 2003."

J YK has proceeded on the basis that this entitles Fonfair to claim back the
K legal costs incurred in dealing with the consequences of Harbour Front's
L breaches of the Shareholders Agreement.

M 66. I accept that there is room for argument about whether the
N legal costs are all recoverable from Harbour Front and some may not be,
O but it seems to me that particularly as Harbour Front have known about the
P claims for years and made no effort to dispute them, the complaint falls far
short of anything capable of justifying a winding up of Fonfair.

Q 67. Mr Fung sought in cross-examination and in his closing
R submissions to advance further unpleaded complaints about some of the
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T ¹² (unrep., HCCW 663/2002) (9 June 2003), at [5].

U ¹³ (unrep.) (3 September 2008).
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sums attributable to Harbour Front included in the interim reports. They concerned:

- (1) The impact of the UDL scheme of arrangement and the suggestion that this resulted in loss of rent not being recoverable from July 1999 to March 2000.
- (2) A complaint about the charging of legal costs in HCA 1886/2001 and HCCW 663/2002.
- (3) A suggestion that parity was reached in May or June 2013 and YK tried to hide this by instructing Lau & Au Yeung to include additional legal costs to delay parity being reached.

It is well established that all allegations that a petitioner wishes to rely on must be stated in the petition.¹⁴ If they are not, the allegations cannot be relied on. Consequently, Harbour Front cannot rely on these new allegations.

68. I find that Harbour Front has failed to establish that the reconciliation has been carried out in a way that so prejudices it that a winding up order or alternative relief is justified. To the extent that there are grounds for arguing over individual items these are matters that Harbour Front has had the opportunity to address and have singularly failed to do so as illustrated by Mr Fung attempting to identify new things to complain about during cross-examination.

¹⁴ *In re Fildes Brothers Ltd* [1970] 1 WLR 592, 597G–598C; quoted by Kwan J in [18] of *Re Luen Fat Ltd* [2008] HKEC 1878.

Conclusion and Costs

69. For the above reason I have dismissed the Petitions. I will make a costs order *nisi* that Harbour Front pays the costs of the Petitions such costs to be taxed if not agree with a certificate for two counsel.

(Jonathan Harris)
Judge of the Court of First Instance
High Court

Mr Daniel R Fung SC and Mr Jenkin Suen, instructed by Tsang & Lee,
for the petitioner (in both actions)

Ms Frances Lok and Mr Vincent Chiu, instructed by Ho & Ip,
for the 1st respondent (in both actions)

The 2nd respondent in HCCW 116/2015 was not represented and
did not appear

The 3rd respondent in HCCW 116/2015 was not represented and
did not appear

The 4th respondent in HCCW 116/2015 was not represented and
did not appear